No. 12,430

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES, (a California Legislative Committee); HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON, CLYDE A. WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

Codes and Statutes

Texts

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Northern District of California, Southern Division, dismissing appellant's complaint for damages under the Civil Rights Act, (Rev. Stat. §§ 1979 and 1980, 8 U.S.C. §§ 43 and 47(3)) as to each and all of the appellees.

Jurisdiction below was based on 28 U.S.C. § 1343 (1), (3). Jurisdiction of this Court is conferred by 28 U.S.C. § 1291.

STATUTES INVOLVED.

(1) Rev. Stat. § 1979 from Act of Apr. 20, 1871 c. 22 § 1, 17 Stat. 13; Title 8 U.S.C. section 43:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(2) Rev. Stat. § 1980 from Acts July 31, 1861 c. 33 12 Stat. 284; Apr. 20, 1871 c. 22 § 2, 17 Stat. 13; Title 8 U.S.C. 47(3):

> "Conspiracies; to deprive citizen of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or

if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or in property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE.

On January 28, 1949, appellant, William Patrick Brandhove circulated a petition entitled: "A Protest Against a Renewed Appropriation for the California Senate Committee on Un-American Activities (The Tenney Committee)" among the members of the California Legislature at the State capitol in Sacramento. (T.R. 4, 18-22). The subject matter of said petition was stated therein as follows:

"I, William Patrick Brandhove, charge that the California Senate Committee on Un-American Activities (The Tenney Committee) used me as

an instrument to smear Congressman Franck R. Havenner as a "Red" when he was a candidate for Mayor of San Francisco in 1947, and that the Republican machine in San Francisco and the campaign management of Elmer E. Robinson, Franck Havenner's opponent, conspired with the Tenney Committee to this end" (T.R. 4-5, 18-22).

In support of this statement said petition referred to a number of incidents to substantiate this charge (T.R. 19-20), and the stated purpose of said petition was to pursuade the California Legislature to discontinue further appropriations of funds for The Tenney Committee (T.R. 5, 18-22).

While appellant was engaged in circulating said petition, as aforesaid, a subpoena was served upon him ordering him to appear as a witness at a hearing to be held before The Tenney Committee on the following day, to wit: January 29, 1949. (T.R. 5, 22-23). No reference was made in said subpoena to the purpose or object of said hearing, or of the testimony required thereat (T.R. 5, 22-23). Before the service of said subpoena on appellant, but after the content of said circulated petition had become known to appellee, Jack B. Tenney, said appellee, the chairman of the criticized committee, discussed with appellee Elmer E. Robinson the best way and means of defeating the effect and purpose of said petition and they then and there agreed that the aforementioned hearing should be held, and that appellee, Elmer E. Robinson should appear at said hearing as

a voluntary witness to deny the truth of the contents of appellant's petition (T.R. 5-6, 45-47).

On the same day, to wit, January 28, 1949, and in order to silence appellant and defeat the effect of his said petition, appellees Jack B. Tenney and Hugh M. Burns, chairman and vice-chairman respectively of The Tenney Committee, with regard to appellant's petition, sent State telegrams to two District Attorneys of the State of California, demanding on behalf of said Committee that appellant be prosecuted for perjury (T.R. 6, 23-25).

A hearing was held by The Tenney Committee on the next day, to wit, January 29, 1949, at which all appellees, excepting Elmer E. Robinson, were sitting as members of said Committee, and at which appellee Elmer E. Robinson, as agreed with the chairman of said Committee, appeared as a voluntary witness (T. R. 6, 27-28, 47). At said hearing appellee Elmer E. Robinson was permitted to make a lengthy unsworn statement first (T.R. 7, 45-48) and after having been sworn as a voluntary witness was given unbridled discretion in conducting a self justification of the charges contained in appellant's said petition (T.R. 7, 50-67). Pursuant to the subpoena served upon him, appellant appeared at said hearing and after answering questions as to his identity (T.R. 28) objected to the committee's further questions on the ground that the Committee was not acting for a legislative purpose at that hearing but was attempting to acquit itself of the charges made in appellant's petition to

the California Legislature and was therefore then acting as judge and accused in the same case thereby exceeding its powers and jurisdiction. (T.R. 8, 28-32, 35-38). These objections were overruled by The Tenney Committee (T.R. 32) and appellant was then asked a great number of questions with regard to his personal affairs and acquaintances to which said Committee had previously obtained sworn answers from him (T.R. 7, 38-41, 42-43). At said hearing appellee Jack B. Tenney, as chairman of said Committee, read into the record of the hearing a false alleged criminal record of appellant and a newspaper article wherein an affidavit of appellant was called a "tissue of lies" and an alleged telephonic statement by the Chief Counsel of The Tenney Committee to appellee Jack B. Tenney "that Mr. Brandhove (appellant) was a liar" (T.R. 7, 43-45, 74). Furthermore, at said hearing appellant's counsel, although he was not summoned was called as a witness by said Committee and interrogated at length about his private affairs, and when he referred to decisions of the United States Supreme Court supporting the objections raised by appellant against said hearing and supporting appellant's refusal to answer questions thereat, said counsel was threatened with expulsion from the hearing room (T.R. 7-8, 48-50, 34-35). At said hearing The Tenney Committee, by unanimous vote of its members, resolved that a criminal complaint be filed in the proper Court at Sacramento, California, because of appellant's refusal to answer questions thereat (T.R. 8, 42). Such complaint charging appel-

lant with the misdemeanor of violating section 9412 of the Government Code of the State of California, signed and sworn to by appellee, Jack B. Tenney, was filed on January 31, 1949, in the Municipal Court of the City of Sacramento (T.R. 8, 74). Upon said complaint, appellant was arrested and imprisoned from the 1st day of February to the 15th day of February, 1949 (T.R. 8). Appellant was tried with jury on said complaint on February 28, 1949, up to and including March 5, 1949 on which latter date the jury announced that the jurors could not agree on a verdict, the count being eleven (11) for acquittal and one (1) for conviction (T.R. 9). Said cause was continued to March 9, 1949, on which date on motion of the prosecuting attorney the charge was dismissed and the appellant discharged. Appellant committed no public offense at said hearing since the hearing was not held for a legislative purpose and was not a fair and impartial hearing as required under the 14th Amendment to the United States Constitution and under the resolution creating The Tenney Committee and that the questions asked of appellant were not material or proper as required by section 9412 of the California Government Code (T.R. 8-9). After appellant's discharge from custody, he brought this action for damages under the Civil Rights Act alleging that the acts of the appellees above set forth were done or participated in with malice and intent to intimidate and silence appellant and to deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the legisla-

ture for redress of grievances; that he was deprived of the equal protection of the laws, due process of law and of the enjoyment of equal privileges and immunities as a citizen of the United States under the law (T.R. 10); that the acts of all appellees, except appellee Robinson, were done under color of State authority; that all appellees, including appellee Robinson, conspired for the aforesaid purposes and acted as above set forth in furtherance of such conspiracy (T.R. 10).

Upon appellees' motions to dismiss appellant's complaint (T.R. 76-85, 89-97) the District Court made its order granting said motions (T.R. 124-125) and entered judgment dismissing appellant's action on the merits (T.R. 125-126).

This appeal is from said judgment (T.R. 126).

ARGUMENT.

I.

THE COURT ERRED IN GRANTING THE MOTION TO DISMISS MADE BY EACH AND ALL OF THE APPELLEES, EXCEPTING APPELLEE ROBINSON, AND ERRONEOUSLY DISMISSED THE ACTION AS TO SAID APPELLEES.

A. Appellant's complaint states a cause of action for damages under the Civil Rights Act against said appellees.

The Present Action is Based on Intentional Abuse of State Authority to Deny a Political Opponent: (a) The Right of Free Speech, (b) the Right to Petition the Legislature for Redress of His

Grievances, (c) the Right to a Fair and Impartial Hearing in Matters Concerning his Person, Privacy, Opportunity to Earn a Living and His Honor, and (d) the Equal Protection of the Laws.

All these rights are fundamental federal rights and as such are protected by the Federal Constitution and the laws of the United States. They are therefore within the provisions of sections 43 and 47(3) of Title 8 U.S.C.

See also: sections 51 and 52 of Title 18 U.S.C. which are construed as being *in pari materia* with sections 43 and 47(3) Title 8 U.S.C.

Picking v. Penn. Ry. Co., 151 F. (2d) 240, 248.

By enacting section 43 of U.S.C. Title 8, Congress gave a cause of action sounding in tort to every individual within the jurisdiction of the United States whose federal rights are infringed by any person acting under color of state law.

Hague v. C.I.O., 307 U.S. 496;
United States v. Classic, 313 U.S. 299;
Screws v. United States, 325 U.S. 91;
Picking v. Penn. Ry. Co., 151 F. (2d) 240;
Refoule v. Ellis, 74 F. Supp. 336;
Gordon v. Garrson, 77 F. Supp. 477.

The complaint, necessarily read as a whole, alleges in substance that when said appellees became aware of appellant's political criticism voiced in his petition to persuade the California legislators to discontinue

further appropriations for The Tenney Committee, they abused their State authority as members of the criticized legislative committee for the purpose of silencing appellant and deterring him from further action to the same end. According to the allegations of appellant's complaint said appellees did this by various connected actions for the same end to wit: sending State telegrams to various district attorneys urging them to prosecute appellant for perjury for circulating said petition (T.R. 6, 23-25); holding an unfair and partial hearing of The Tenney Committee (T.R. 6-8, 26-75); compelling appellant's attendance at said hearing without prior disclosure of the purpose thereof (T.R. 5, 22-23); propounding thereat questions to him and his counsel which were not pertinent to any legislative purpose (T.R. 9, 32-50); citing appellant for contempt on his refusal to answer the questions propounded to him based upon proper objections by himself and his counsel raised at said hearing (T.R. 8, 30-32, 35-38); threatening appellant's counsel with expulsion from the hearing room (T.R. 8, 34-35); reading into the record at said hearing a false alleged criminal record of appellant and a newspaper article calling an affidavit of appellant "a tissue of lies" and an alleged telephonic statement by the Chief Counsel of The Tenney Committee that appellant was "a liar" (T.R. 7, 43-45, 73-74); and causing appellant's arrest and imprisonment and compelling him to stand trial on a criminal contempt charge (T.R. 8-9).

This treatment of appellant under color of State authority violated appellant's constitutional rights of free speech and of freedom to petition the legislature for a redress of his grievances, and deprived him of a fair and impartial hearing and of the equal protection of the laws (T.R. 10).

If he who dares to speak his mind is for that reason subjected to the treatment accorded appellant by State authority without such authority having violated the federal law on the pleaded facts of the instant case, then those freedoms become words without substance.

Thornhill v. Alabama, 310 U.S. 88, 97.
Thomas v. Collins, 323 U.S. 516, 530;
Jones v. Securities Comm., 298 U.S. 1, 26;
Schneiderman v. United States, 320 U.S. 118;
West Va. State Bd. of Ed. v. Barnette, 319 U.S. 624;
Hannegan v. Esquire, 327 U.S. 146;
Terminiello v. City of Chicago, 93 L. Ed. Adv. Op. 55.

B. State law cannot vest any person with immunity to violate the federal rights of another.

It is the essence of the provisions of the Civil Rights Act to protect all individuals within the jurisdiction of the United States from any exercise of State authority in violation of the federal rights of that individual.

It is immaterial whether the person who violates the federal rights of another by exercise of his State authority acts in conformity with State law.

United States v. Classic, supra, 313 U. S. 299, 326:

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

Ex parte Virginia, 100 U.S. 339, 346, 347:

"* * * A State acts by its legislative, its executive or its judicial authority. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with State's power, his act is that of the State. This must be so or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or evade it."

See also:

Screws v. United States, 325 U.S. 91, 114 and 133.

"Violation of state law there may be. But from this no immunity to federal authority can arise where any part of the Constitution has made it supreme. To the Constitution state officials and the states themselves owe first obligation. The federal power lacks no strength to reach their

malfeasance in office when it infringes constitutional rights. If that is a great power, it is one generated by the Constitution and the Amendments to which the states have assented and their officials owe prime allegiance.

The right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power is such a right. To secure these rights is not beyond federal power. This, sections 19 and 20 have done in a manner history has long since validated." (Rutledge, J., concurring in result, *Screws v. United States,* p. 133).

In *Picking v. Penn. Ry. Co.,* supra, 151 F. (2d) 240, it was held:

Congress by enacting section 43 Title 8 U.S.C. intended to abrogate absolute privilege conferred by common law upon state judicial officers in performance of their duties to the extent indicated by said section (p. 250), and further: where a cause of action against the Governor of Pennsylvania based on his acting upon a warrant for extradition of Plaintiffs to New York arose under section 47 Title 8 U.S.C., Pennslvania statutes sections 192, 292 relieving the Governor of liabillity if he based his action upon advice of the Department of Justice could not relieve him from his responsibility under the Civil Rights Act (p. 251).

The District Court has differed from the principle of responsibility for violations of federal rights as recognized in these decisions.

In its order granting appellees' motion to dismiss the District Court has referred to the following authorities: *Dennis v. United States,* 171 F. (2d) 986; *Smith v. California,* unreported, certiorari denied 336 U.S. 957; *Eisler v. United States,* 170 F. (2d) 273; *Barsky v. United States,* 167 F. (2d) 241, 250; *Keppleman v. Upton,* 84 F. Supp. 478. All these cases, with the sole exception of *Smith v. California,* supra, relate to the exercise of federal governmental power by Congressional Committees or public officers of the United States. The present case, however, does not relate to the exercise of governmental power by a Congressional Committee or by an officer of the federal government; appellant here seeks relief from the abuse of State power. There is a fundamental difference between the rights conferred upon a person by the Civil Rights Act against the abuse of State power and his remedies against abuse of Federal power by Congressional Committees or public officers of the Federal government. While the Civil Rights Act gives a cause of action for damages against anyone acting under color of State law who has violated Federal rights of the complaining party, a rule of immunity has been applied to Congressional Committees and Federal officers, which has been stated in *Barsky v. United States,* 167 F. (2d) 241, 250, as follows:

> "The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. The courts have no authority to speak or act upon the conduct by the legislative branch of its

> own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.' The question presented by these contentions must be viewed in the light of the established rule of absolute immunity of governmental officials, Congressional and Administrative, from liability for damage done by their acts or speech, even though knowingly false or wrong. The basis of so drastic and rigid a rule is the overbalancing of the individual hurt by the public necessity for untrammeled freedom of legislative and administrative activity, within the respective power of the legislative and the executive."

Since the Civil Rights Act and the decisions of the United States Supreme Court and other Federal Courts construing it make it clear that the Federal rights of citizens protected by that act shall not give way to any power or immunity which the State law may attempt to confer upon any State body or State official, it would therefore confuse the legal issues of the present case to discuss cases concerning Congressional Committees such as *Barsky v. United States,* supra; *Dennis v. United States,* supra; and *Eisler v. United States,* supra; or *Keppleman v. Upton,* supra, 84 F. Supp. 478, which latter case related to a suit for damages against officers of the United States Armed Forces and, in addition, also involved matters of military discipline. It may be said in passing, however, that even as to the power of Congressional Committees it was stated in *McGrain v. Daugherty,* 273 U.S. 135, 175-176:

> "We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson*[1] and *Marshall v. Gordon*[2] point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *Re Chapman*[3] that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

See also: *Jones v. Security Exchange Commission,* 298 U.S. 1, 26, holding that a citizen, when interrogated about his private affairs, had the right before answering, to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, may not be compelled to answer.

The only case cited in the order of the District Court which refers to State as distinguished from Federal power is *Smith v. California,* unreported, cert. denied, 336 U.S. 957, holding under the facts of that case that the resolution creating The Tenney Committee did not violate the Federal Constitution. As this decision does not relate to an abuse of State power in violation of the rights protected by the Civil Rights Act, it is no authority for the proposition that the State can confer immunity on any State

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[1] 103 U.S. 168.
[2] 243 U.S. 521.
[3] 166 U.S. 661.

body or State official from actions for damages under said Federal Statute.

C. The resolution of the California State Senate creating the appellee committee known as the Senate Fact-Finding Committee on Un-American Activities is unconstitutional.

The California Senate resolution creating The Tenney Committee (T.R. 12-18) violates the due process clause of the Federal Constitution in that it lacks the degree of certainty which is required in a statute or other rule of state law, affecting fundamental rights.

Connally v. General Construction Co., 269 U.S. 385, 391;

Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239;

In re Di Torio, 8 F. (2d) 279, 281;

Perez v. Sharp, 30 Cal. (2d) 711, 728, 198 Pac. (2d) 17.

The issue of the constitutionality of said resolution is raised however only in the alternative so that it need not be gone into before the other issues are determined, since it is clear that said Committee acting under said resolution acts under color of state law regardless of the constitutionality of that resolution.

See:

United States v. C.I.O., 335 U.S. 106, 110, 124, 125;

Rescue Army v. Municipal Court, 331 U.S. 549, 568, 569.

II.

THE COURT ERRED IN GRANTING THE MOTION TO DISMISS MADE BY APPELLEE ELMER E. ROBINSON AND ERRONEOUSLY DISMISSED THE ACTION AS TO SAID APPELLEE.

a. **Points A, B and C supra.**

b. **Appellant's cause of action under the Civil Rights Act extends to any person who, without himself being clothed with State authority, engaged in a conspiracy with others so clothed and acting under color of State law.**

Appellant alleged in his complaint that appellee Elmer E. Robinson in preparation of the improper hearing and during said hearing conspired with the other appellees to deprive appellant of his federal rights (T.R. 5, 6, 7 and 10) and acted in furtherance of this conspiracy in the manner therein set forth (T.R. 10, 45-48, 50-67).

Appellant's cause of action under Section 43 Title 8 U.S.C. extends to any person who, without himself being clothed with state authority, engaged in a conspiracy with others so clothed and acting under color of state law.

Downs v. United States, 3 F. (2d) 855, 857;
Picking v. Penn. Ry. Co., 151 F. (2d) 240.

In *Johnson v. United States,* 158 F. 69, it was held:

> "A defendant, therefore, may be convicted of a conspiracy to commit an offense when in the nature of things he could not have committed the offense himself, if it be an offense which one of his coconspirators could commit."

See also: 11 Am. Jur. 547, footnote 7; 5 A.L.R. 787; 74 A.L.R. 1114.

All of the defendants including defendant Robinson, since they engaged in such conspiracy, are liable in damages also under Title 8 Section 47(3).

Picking v. Penn. Ry. Co., 5 F.R.D. 76, 77.

"If two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy. It is not essential that each conspirator have knowledge of the details of the conspiracy, or of the exact part to be performed by the other conspirators in execution thereof; nor is it necessary that the details be completely worked out in advance to bring a given act within the scope of the general plan."

CONCLUSION.

For the reasons hereinabove stated the appellant's complaint herein properly stated a cause of action for damages under the Civil Rights Act against each and all appellees and the order of the District Court dismissing the action and the judgment thereon should be reversed.

Dated, San Francisco, California,
February 10, 1950.

Respectfully submitted,
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